Supreme Court, U.S.
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No. 84-1988

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ANTHONY R. SCHUBERT

Petitioner

v.

RICHARDSON SECURITIES OF CANADA
GEORGE T. RICHARDSON, Sen. Partner
FRANK B. LAMONT, Partner
W. H. LORNE ROLSTON, Partner
RICHARDSON SECURITIES, INCORPORATED

COMMODITY EXCHANGE, INCORPORATED

COMMODITY FUTURES TRADING COMMISSION

Respondents

REPLY BRIEF

Of The Petitioner

Anthony R. Schubert
Pro Se Petitioner
120 West 5th Avenue
Hutchinson, Kansas 67501
(316) 663 4553

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ARGUMENT

A. SUIT UNDER THE TORT CLAIMS ACT MUST NAME THE UNITED STATES AS DEFENDANT.

The Commission may not be sued in its own name under the Tort Claims Act, 28 U.S.C. Sec. 2679, Holmes v. Eddy, 341 F.2d 477, 480 (1965).

That point of law was known early in this case. By Motion and Brief, Docs. Nos. 18 and 20 page 6, Rec. on App., Schubert requested leave of Court to amend Complaint to remove the Commission and substitute the United States as defendant, as correction of an error within the purview of Rule 15, or by joining the United States and dropping the Commission pursuant to Rule 19, Federal Rules of Civil Procedure.

The Court disregarded Motion to Amend.

B. SCHUBERT HAS EXHAUSTED HIS ADMINISTRATIVE REMEDIES UNDER THE STATUTE.

By letter dated April 10, 1981, Schubert presented the claim in suit to the Commission, citing the Commission for negligence. By letter dated April 29, 1981, Mr. Thomas J. Loughran, Director, Division of Enforcement, CFTC, refused to consider the claim, and referred Schubert to Reparations procedures under the Act, Brief, Docu. No. 20, Rec. on Appeal, at page 17. Since Reparations procedures do not provide for claims against the Commission, but only for claims against registrants under the Act, and only for violations of the Act, and in as much as the Reparations procedure is not administrative, but judicial, Commission letter of April 29, 1981, is substantial denial of the claim. Thus, Schubert has exhausted his administrative remedies.

Fairchild, Arabatzis & Smith et al. v. Sackheim et al., CCH Comm. Fut. L. Rep. Para. 20,595 (S.D.N.Y., 1978), provides the doctrine of exhaustion of administrative remedies may be disregarded by the Court when administrative procedures made available by the Commission do not apply.

C. THIS SUIT ALLEGES COMMISSION FAILURE TO ENFORCE THE PUBLIC INTEREST STANDARD FOR THE EXCHANGE, SEC. 5(g).

In his July, 1985, Memorandum in Opposition, page 3, the Acting Solicitor General refers to the petitioner's contention that the Commission failed adequately to regulate commodity brokers.

The Commission duty of regulation under the Act applies to its registrants.

The regulation of Exchange members under the public interest standard in the Act, Sec. 5(g), is the duty of the Exchange.

The Commission and the Exchange, thus, have a concurrent regulatory responsibility, Brief, Docu. on Appeal No. 125.

Sec. 5 imposes on the Commission the duty of enforcement. The Statute allows no latitude as to whether the Commission enforces Sec. 5 provisions.

This suit alleges Commission enforcement failure under Sec. 5. It does not question under the Tort Claims Act the propriety of Commission action pursuant to Sec. 8a(5) and 8a(8), Motion and Brief, Docs. Nos. 119, 120, Rec. on Appeal.

Varig Airlines Does Not Support Commission Exemption under Tort Claims Act. The Acting Solicitor General cites United States v. Varig Airlines, 104 S.Ct. 2755, 81 L.Ed.2d. 660 (1984) to support his contention of Commission discretionary function exception in respect to the enforce-

ment issue, 7 U.S.C. Sec. 7(g), 28 U.S.C. Sec. 2680(a).

Varig Airlines bars a Tort Claims suit which challenges review by the Federal Aviation Administration of compliance with regulations regarding aircraft certification. The relevant provisions of the Federal Aviation Act provide for delegation of responsibility for the compliance review at issue, because of the volume of work in certification, 81 L.Ed.2d 670. There is no comparable provision in 7 U.S.C. Sec. 7.

The FAA was in compliance with the law; the Commission is in violation.

Thus, Varig Airlines is inappropriate to support the theory of Commission discretionary function exception in respect to its duty of enforcement, 7 U.S.C. Sec. 7(g), 28 U.S.C. Sec. 2680(a).

E. THE ACTING SOLICITOR GENERAL DISREGARDS THE INTENT OF THE LAW.

The overriding issue in this case is whether Schubert is entitled to due and reasonable care in the execution of his commodity trades on the Exchange; whether the Congress in drafting the Commodity Exchange Act intended that futures trades be conducted in accordance with principles of fair practice, or intended to give the Commission authority to maintain a free-for-all trading environment, with the odds, by the nature of the business, weighed in favor of the professionals.

The record shows the following:

a) Richardson did not exercise due care, defined in the common law of the State as the level of care a prudent individual gives his own trades, in the trades at issue, Santoro v. New York Cen-

tral Power Corporation, 72 N.Y.S.2d 12, 13 (1947), Trans., Doc. on App. No. 107 at 118-119;

b) The regulations of the Commission do not require the exercise of due care in executions, Commission Regulations under the Act, Reg. Sec. 166.2;

c) The rules of the Exchange do not require the exercise of due care off-Exchange, Brief, Counsel for the Exchange, Sept. 15, 1981, Docu. on App. No. 16 at 5-7, Brief on App., Jan. 10, 1985, at pages 9-10;

d) The public interest standard in Sec. 5(g) requires the Exchange to adopt rules requiring members to deal fairly with the public on and off-Exchange;

e) The duty of the Exchange to en-

force the fair practice of the members is supported in the common law. The doctrine of unjust enrichment prohibits the Exchange accepting the benefits of commodity trades of improper origin, Herweck's Paint and Wallpaper Co. et al. v. C. I. T. Corporation, 123 F.2d 989, 990 (5th Circ. 1941), County of Macon v. Shores, 97 U.S. 889, 890 (1877);

f) The law authorizes and directs the Commission to enforce the public interest standard for the Exchange, 7 U.S.C. Sec. 7(g);

g) The Commission does not enforce the public interest standard for the Exchange, Notice of Dec. 23, 1976, 41 F.R. 56134, CCH Com. Fut. L. Rep. Para. 20,242 at

21,287, Schubert Pet., June 17, 1985, at A-26-27, Commission Guideline on Economic and Public Interest Requirements for Contract Market Designation, 47 Fed Reg. 49832 (1982).

Intent is Shown in the House Floor Debate. Debate on the floor of the House of Representatives at the introduction of the bill, the Commodity Futures Trading Commission Act of 1974, H.R. 13113, by Congressman Poage of the House Committee on Agriculture, shows clear intent to insure that the Commission is responsive to the public interest, under the new law creating the CFTC, 120 Cong. Rec. 10767, April 11, 1974.

Intent is Indicated by the Wording. It is appropriate to look to the wording of the Statute to establish intent,

United States et al. v. American Trucking Ass'n, Inc. et al., 60 S.Ct. 1059, 1063 (1940).

The primary concern of the Commodity Exchange Act is for the public interest, 7 U.S.C. Sec. 5, Necessity for Regulation. It is the intent of the Statute that the concern for the public interest include fair business practice in trading, 7 U.S.C. Sec. 10a(8):

> ". . . to make and promulgate such rules and regulations . . . to protect the public interest and promote just and equitable principles of trade . . ."

Concern Is for Inadequate Enforcement. As expressed by the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the United States Senate, in Report "Commodity In-

vestment Fraud", No. 97-495, of July 13, 1982, the concern of Congress is to find a way to make the Commission more effective, Report at page 49:

> "The CFTC has been unable to stem the recent tide of commodity frauds, yet it systematically authorizes new areas of trading which may be subject to ever increasing fraud."

Guideline Shows Indifference to Practice. In footnote, pages 3 and 4 of Brief, the Acting Solicitor General cites Commission Guideline on Economic and Public Interest Requirements for Contract Market Designation, 47 Fed. Reg. 49832. The Guideline substantiates the statement in Notice of December 23, 1976, that the Commission does not enforce the requirement in the standard of Exchange adoption of fair practice rules for members. It states only economic purpose standards.

Rule 155.3 Does Not Fulfil 7 U.S.C. 5(g). The Solicitor cites Commission Reg. Sec. 155.3 as implementing Sec. 5(g). Reg. Sec. 155.3 imposes obligations not upon Exchange members but upon Commission registrants, in respect to proprietary account trading, disclosure, and affiliated person trading.

The Solicitor adds that in light of Rule 155.3 the Commission found it unnecessary to require exchanges to adopt similar requirements.

Commission substitution of Commission rule-making for Exchange rule-making violates the Statute. While Reg. Sec. 155.3 in itself is excellent, it does not address fair practice in executions, comparably defined in the securities industry as the level of care a broker gives trades for his account, Compl. Para. (s).

Rule 155.3, thus, does not address the issue in this case, the exercise of due care, as defined and required by law.

Hatahley is a Case of Agency Action in Violation of the Law.

In footnote, page 3 of Brief of July, 1985, the Solicitor states Schubert's reliance on Hatahley v. United States, 76 S.Ct. 745 (1956), is misplaced since in that case government agents were in violation of state law.

The State law in question is the Utah abandoned horse statute. In Hatahley, Federal range agents, purporting to act under the State law, seized and disposed of horses belonging to Navajo indians. The Federal agents violated the Federal Range Code for Grazing Districts, under the Federal Taylor Grazing Act. The Federal Range Code requires that written

notice and order to remove the livestock be served on violators, 76 S.Ct. at 750.

The Court found the Federal agents failed to exercise due care within the meaning of the Tort Claims Act exception, 28 U.S.C. Sec. 2680(a), 76 S.Ct. at 752. No agency has discretion to flaunt the law. The Acting Solicitor's objection to Hataley, thus, is not consistent with the findings of the Court.

CONCLUSION

For the foregoing reasons, the Court is respectfully requested to grant writ of certiorari in this case.

Respectfully submitted,

August 2, 1985

Anthony R. Schubert
120 West 5th Avenue
Hutchinson, Ks. 67501
(316) 663 4553

AFFIDAVIT OF SERVICE

Reference: Schubert v. Richardson Securities of Canada et al., Case No. 84-1988

Petitioner in the above-referenced case certifies that his REPLY BRIEF of August 2, 1985, responding to Memorandum for the Commodity Futures Trading Commission in Opposition of the Solicitor General has been served on Respondents as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

Kenneth M. Raisler, Gen. Couns.
Commodity Fut. Trad. Commission
2033 K Street, N. W.
Washington, D. C. 20581

John Linsenmeyer, Esq.
Morgan Lewis & Bockius
101 Park Avenue
New York, New York 10178

Barry J. Mandel, Esq.
Baer, Marks & Upham
805 Third Avenue
New York, New York 10022

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Petitioner further certifies that all parties required to be served in this proceding have been served by Certified Return Receipt United States Mail, deposited in the United States Post Office at the time of mailing to the Clerk of the Court.

Anthony R. Schubert
120 West 5th Avenue
Hutchinson, Kansas 67501
(316) 663 4553

SUBSCRIBED AND SWORN to before me on this 2nd day of August, 1985.

Annabel A Milles

ANNABEL A
NOTA
PUBL
My Appt
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STATE OF